IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A Municipal Corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The City of Tacoma prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above entitled case on April 30, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (No. 33706), as supplemented by the Court, is reported in the official reports in 49 Wn. 2d

744, 307 P. 2d 567 (1957), (See R. 441-486; 555-557), attached hereto as Appendix A, *infra*, p. 1a.

A prior opinion in the same case is reported in 43 Wn. 2d 468, 262 P. 2d 214 (1953), (See R. 37-61) attached hereto as Appendix B, *infra*, p. 49a.

The related opinion and order of the Federal Power Commission, granting the petitioner the license to construct the dams in question, is reported in 92 Pur. (N. S.) 79 (Fed. Power Commission Opinion No. 221 on Project No. 2016), attached hereto as Appendix C, *infra*, p. 81a. The related opinion of the United States Court of Appeals for the Ninth Circuit, affirming the Federal Power Commission's grant of the license, is reported in 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954) attached hereto as Appendix D, *infra*, p. 112a.

JURISDICTION

(i) The Judgment of the Supreme Court of the State of Washington is dated and was entered on April 30, 1957 (R. 559), a copy of which is attached hereto together with the judgment of the lower court which was affirmed (R. 320-322) as Appendix E, *infra*, p. 126a.

(ii) Rehearing was denied on April 30, 1957 (R. 558), and a copy of the Court's order is attached hereto as Appendix F, *infra*, p. 131a. By Order dated July 22, 1957, this Court extended the time in which petitioner could file for a writ of certiorari until and including September 27, 1957. Appendix G, *infra*, p. 132a.

(iii) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

QUESTION PRESENTED

May a state enjoin construction of a dam and power plant affecting navigable waters of the United States, licensed by the Federal Power Commission, upon the ground that the power of eminent domain conferred by Section 21 of the Federal Power Act upon licensees cannot be exercised by a municipality to condemn lands dedicated by the state to a public use (here as a fish hatchery) within the project reservoir area, absent state legislation specifically conferring such authority?*

In historical perspective, the issue is whether a device to enable a state to veto federal jurisdiction to authorize a project under the Federal Power Act, unsuccessfully sought in various forms in *New Jersey* v. *Sargent*, 269 U. S. 328 (1926); *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940); *First Iowa Hydro-Electric Coop.* v. *Federal Power Com'n*, 328 U. S. 152 (1946); *Iowa* v. *Federal Power Com'n*, 178 F. 2d 421 (8th Cir. 1949), *cert. denied* 339 U. S. 979 (1950); *State of Wash. Dept. of Game* v. *Federal Power Com'n*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied* 347 U. S. 936 (1954); *Wisconsin* v. *Federal Power Com'n*, 214 F. 2d 334 (7th Cir. 1954), *cert. de-*

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* Should certiorari be granted upon the foregoing question, the petitioner requests the privilege of briefing and arguing the following question:

> "Is a state barred from litigating the authority of municipalities to condemn such property where the Federal Power Commission, in license proceedings to which the state was a party, has held that the applicant 'has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project'; and the Federal Circuit Court of Appeals, on the state's petition for review, has sustained the Commission's order and license?"

nied 348 U. S. 883; *Federal Power Com'n* v. *State of Oregon*, 349 U. S. 435 (1955); has now been discovered: namely, acquisition by a state of a few acres in a reservoir area, dedication thereof to a public purpose (such as a highway, fish hatchery, or comfort station), and refusal to sell. This device, if successful in the form asserted here—denial to a municipality of the right of condemnation conferred upon licensees by the Federal Power Act—has an additional facet: the state may thereby veto the preference right of municipalities granted by Section 7 of the Federal Power Act if the project necessitates taking state-owned lands of this character, while leaving undisturbed the same right of eminent domain if asserted against those same lands by a private power company.

STATUTE INVOLVED

The statutory provision involved is Section 21 of the Federal Power Act, 41 Stat. 1074, 16 U. S. C. § 814, which provides as follows:

> Section 21. "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and

procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000."

STATEMENT OF THE CASE

On December 28, 1948, the City of Tacoma, Washington, filed with the Federal Power Commission an application for a Federal license to construct two power dams on the Cowlitz River in the State of Washington, affecting navigable waters of the United States.*

The Cowlitz River flows south, joining the Columbia River below Portland, Oregon. The Cowlitz project comprises two dams, Mossyrock and Mayfield, with appurtenant power plants and other works. Mossyrock, to be located sixty-five miles upstream from the junction of the Cowlitz and Columbia, comprises a dam to rise five hundred ten feet above bedrock, with a natural reservoir extending upstream twenty-one miles, covering an area of about 10,000 acres. The river's flow, equated by the dam, will pass through a hydroelectric power plant having an initial installation of 225,000 kilowatts and an ultimate potential of 300,000. Mayfield dam, located thirteen and one-half miles downstream from Mossyrock, will rise two hundred forty feet above bedrock, delivering water to

* The Federal Power Commission found that the Cowlitz River was navigable below the site of the proposed dams and that their construction would affect the interests of interstate and foreign commerce.

a power plant with an initial potential of 120,000 kilowatts and an ultimate potential of 160,000, from a reservoir pool of about 2,200 acres extending to the tailwater of the Mossyrock dam. The ultimate combined capacity of the two dams is 460,000 kilowatts.* The project will cost about $135,000,000,** plus $9,465,000*** for devices to enable anadromous fish to pass upstream and their young to return to the sea, and new fish hatcheries. The lower dam, Mayfield, will inundate a state-owned fish hatchery, on a sixty acre tract, worth about $150,000, which would be replaced at Tacoma's expense by a new hatchery about 1,000 feet away from the old location, outside the reservoir but supplied by the same springs. But the State refuses to sell this hatchery or accept a replacement, and denies Tacoma's right to condemn it under the Federal Power Act, thus precipitating the issue here presented.

The Department of Fisheries and Department of Game of the State of Washington, and the State of Washington through its Attorney General were granted leave to intervene in the license proceeding. They asserted that the license should be denied because of injury to anadromous fish, asserted conflict of the project with the laws of Washington, and specifically alleged in their petition:

> "That the reservoirs which would be created by the proposed dams would inundate a valuable and

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* Federal Power Commission Finding 63 (Appendix C, *infra*, p. 104a).

** Federal Power Commission Finding 29 (Appendix C, *infra*, p. 98a).

*** Federal Power Commission Finding 47 (Appendix C, *infra*, p. 102a).

irreplaceable fish hatchery owned by the State of Washington, as well as much productive spawning areas." (Petition, paragraph 9.)

Under date of November 28, 1951, the Power Commission entered its opinion (No. 221) and order issuing the license to petitioner (Appendix C) (R. 436).

The Commission found, *inter alia* (Finding 59, Appendix C, *infra*, p. 104a):

> "Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes."*

The Commission inserted the following "special condition" in the license:

> "*Article 31.* The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements *and provide such fish hatcheries* and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the

* The opinion elsewhere (Appendix C, *infra*, p. 81a) states that these two plants, with a combined capacity of 460,000 kilowatts, "would add 190 percent to the present capacity of the Tacoma generating plants and nearly 10 percent to the present combined total installation of 4,700,000 kilowatts in the Pacific Northwest power pool."

Commission upon its own motion or upon the recommendation of the Secretary of the Interior." (Appendix C, *infra*, p. 109a) (Emphasis supplied)*

The Commission made express finding that:

"(53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3(7) of the Act." (Appendix C, *infra*, p. 103a)

The State of Washington and its Departments of Fisheries and Game appealed to the United States Court of Appeals for the Ninth Circuit, contending among other things that the City had not complied with certain State laws as required by Section 9(b) of the Act and that the City of Tacoma, as a creature of the State of Washington, could not act in opposition to the policy of the State or in derogation of its laws.

The Ninth Circuit in decision dated October 5, 1953, held that the contentions raised by the State and its Departments of Fisheries and Game were answered by the Supreme Court's decision in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 (1946), which rejected any requirements of State law in conflict with the Federal Power Act, which would give the State or State authorities a veto power over the federal project. (See *Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391; Appendix D,

* The Act of August 14, 1946 (60 Stat. 1080, 16 U.S.C.A. § 661 *et seq.*) requires the Commission to receive the recommendations of the Secretary of the Interior for fish protection.

infra, p. 112a) The Court answered the appellants' "creature" argument by holding that in the *First Iowa* case, the applicant was also a creature of the State and the chief opposition came from the State itself:

> ". . . Yet, the Supreme Court permitted the Applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license." (207 F. 2d at 396; Appendix D, *infra*, p. 120a)

The Ninth Circuit concluded:

> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or *bar the licensee from acting under the license to build a dam* on a navigable stream since the stream is under the dominion of the United States."

It then added the following dictum:

> ". . . However, we do not touch the question as to legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. *Questions of this nature* may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." (207 F. 2d at 396-7; Appendix D, *infra*, p. 121a) (Emphasis supplied)

Certiorari was denied on April 5, 1954. (347 U. S. 936)

In the meantime, subsequent to the Commission's issuance of the license, the City of Tacoma instituted in the State courts on February 3, 1952, the present

action against the Taxpayers of Tacoma and the Directors of Game and Fisheries of the State of Washington, under the provisions of R. C. W. 7.24.010, relating to declaratory judgments, and R. C. W. 7.24.150, providing for testing and determining the validity of a proposed bond issue (R. 1-16). The defendants made no contention that the City lacked authority to issue bonds, but asserted that it was barred from constructing the project because of certain laws of the State of Washington, relating to the protection of fish. The case was decided by the lower court on the pleadings. Cross appeals were taken by both the City and the Departments of Game and Fisheries to the Washington Supreme Court.

The Supreme Court of Washington in a sweeping decision dated October 14, 1953 (First decision, 43 Wn. 2d 468; 262 P. 2d 214 (1953); Appendix B. *infra*. p. 49a), affirmed the position of the City and held the state statutes in question invalid as conflicting with the Federal Power Act, by which Congress exercised its superior powers over navigable waters under the United States Constitution.

To the argument of the taxpayers and the Departments of Game and Fisheries that the City, being a municipal corporation created by the State, may not act under the authority of the Federal laws which are at variance with the laws of the State, its creator,* the court ruled:

> "The Federal Power Act defines the term municipal corporation and authorizes the power com-

* This contention was the basis of the opinion of the dissenting judge and appears to have been adopted by the new majority in the second decision of the Washington Supreme Court, from which this petition of certiorari is sought.

> mission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act." (43 Wn. 2d 492, Appendix B, *infra*, p. 74a)

The decision of the lower court was thus reversed and an order remanding the cause thereto was entered.

The City, then believing that all legal questions had been decided, proceeded with preliminary engineering work and called for and let bids awarding the contract for the building of the smaller of the two dams (Mayfield Dam) in the approximate amount of $16,000,000.00 (R. 287). Bonds were sold and construction commenced in compliance with the license.

Thereafter, on August 8, 1955, some three and a half years after the City had filed the action, and almost two years after the decision of the Ninth Circuit, the State of Washington, in its sovereign capacity, was entered as a party defendant to the action (R. 134-135) on motion of the Directors of Game and of Fisheries. The defendants revived the issue of the power of the City as a municipality of the State of Washington to condemn the same state-owned fish hatchery that the State and its Departments of Game and Fisheries had posed as a bar to the granting of a license in the proceedings before the Commission some five years previously.*

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* Defendant's Answer and Cross-Complaint dated and filed August 29, 1955 to City's Amended Complaint (R. 151-160S; Paragraph II, Second Affirmative Defense (R. 153) and Paragraph IV,

In a Judgment entered March 6, 1956, the lower court ruled that it lacked jurisdiction to determine the question as to the City's power of eminent domain, but held that the City was acting illegally and in excess of its authority to construct these dams as they would interfere with public navigation contrary to the statutes of Washington. On this sole ground, the court ordered the City enjoined from spending any sums of money to construct either of the two dams (R. 320-322). From this decision the City again appealed to the Washington Supreme Court, and cross-appeals were taken by the defendants.

The appeal was heard *en banc*, and the opinion in respect thereto is dated and was entered on February 7, 1957 (Appendix A). On April 30, 1957 an "Addition to Opinion" was entered. (This, by the court's direction, appears as the last paragraph of its opinion as published; Appendix A.) In its "Addition" the court decided all issues in the City's favor except those related to the City's power of eminent domain to take the fish hatchery lands in question.

With respect to the issue as to the City's powers of eminent domain, the court below held that it properly had before it the determination of the *power* of the City to condemn the lands in question, even though no condemnation proceedings had been instituted.

The Washington Supreme Court delineated the eminent domain issue into two facets, one of state law, and the other of federal law, as follows: (1) Whether

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Cross-Complaint (R. 154)). The City's Reply denied that the City lacked eminent domain authority under the "laws of the United States" to acquire the lands (Paragraph II, R. 202; Paragraph VII, R. 203-204; Paragraph IV, R. 239).

the City, which was clearly authorized under Washington law to condemn state land for power projects (*Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700 (1922)), was also authorized to condemn state land which the State has administratively dedicated to a public use (here as a fish hatchery); if not, then (2) "can a municipal corporation be endowed by Federal legislation with power to condemn such lands belonging to the state?" The court after ruling that no state law existed which authorized the City to take state lands dedicated to a public use, then held with respect to the federal question that:

> "The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal Power Act, as we read it, does not purport to do so." (49 Wn. 2d 744, 761; Appendix A, *infra*, p. 20a)

The court distinguished *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm.*, 328 U. S. 152 (1946) and its own earlier decision in *Tacoma* v. *Taxpayers*, 43 Wn. 2d 468 (1953), (Appendix B, *infra*, p. 49a) on the ground that the present matter "does not present a question of *state statutory prohibition;* it presents a question of *lack of state statutory power* in the city."

Based on this ruling, the Washington Supreme Court affirmed the injunction against the City's construction of either of the two dams (R. 559, R. 322; Appendix E, *infra*, p. 126a)

REASONS FOR GRANTING THE WRIT

1. THE PETITIONER HAS BEEN DEPRIVED OF AN IMPORTANT FEDERAL RIGHT ON A QUESTION ARISING UNDER THE FEDERAL POWER ACT NOT PREVIOUSLY DECIDED BY THIS COURT.

The decision of the court below appears to be in conflict with the express intent of Congress, in enacting Section 21 of the Federal Power Act, to give authorized licensees under that Act a federal right of eminent domain where, as here, the Commission has found that the project "is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce." Nothing in Section 21 requires that the Federal licensee shall also have a right of eminent domain under state law to build the Federal project. To the contrary, Section 21, by specifying that only the "practice and procedure" shall conform to that of the state courts where the property is situated, is clear that the substantive right of eminent domain conferred upon the licensee stems from a federal power, independent of the existence or nonexistence of state legislation conferring such a right.

There are at least eleven reported decisions by lower federal courts, none of which were discussed or analyzed by the court below, recognizing that Section 21 of the Federal Power Act confers a *federal* right of eminent domain upon authorized licensees.* This court, however, has never directly decided the point. In *Ford & Son* v. *Little Falls Fibre Company*, 280 U. S. 369 (1930), the question was reserved as follows:

> "... Whether § 21, *giving to licensees the power of eminent domain*, confers on them power to con-

* Cited at page 20, *infra*.

demn rights such as those of respondents, and whether it might have been invoked by the petitioner in the present situation, are questions not before us." (p. 379) (Emphasis supplied)

In *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359 (1948), the question was also carefully saved by the Court:

". . . The petitioner, likewise, is not seeking to enforce such rights as it might have to condemn this land by virtue of its federal license. Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees *in reliance upon rights derived under the Federal Power Act.*" (p. 373) (Emphasis supplied)

Since the court below has denied that the petitioner has any federal right of eminent domain under the Federal Power Act to take the lands necessary for the project, this important question, previously left undecided by this court, is now directly presented.

2. THE DECISION OF THE COURT BELOW PROBABLY CONFLICTS WITH THE OPINION OF THIS COURT IN FIRST IOWA HYDRO-ELECTRIC COOP. v. FEDERAL POWER COM'N, 328 U. S. 152 (1946).

In that case, this Court made a careful analysis of the Federal Power Act with respect to the proper sphere of federal and state powers thereunder. It was concluded there that the Federal Power Act was closely drawn and "resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter." At page 181 of its decision, this Court stated:

> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25]"

In footnote 25, the Court describes the specific provisions to which it refers, listing thereunder:

> "§ 21, federal powers of condemnation vested in licensee . . ."

That a Federal licensee, although established and organized under state law, may exercise powers granted by the Federal Power Act regardless of its granted powers under state law, is also established by the *First Iowa* case. There the applicant was a local cooperative established under the laws of Iowa. Though a creature of the state, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license. Accord, *State of Wash. Dept. of Game* v. *Federal Power Com'n*, 207 F. 2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U. S. 936 (1954).

As in the *First Iowa* case, to require the Federal licensee to secure from the state the counterpart of the authority it has received from the Federal Power Commission would vest in the state "a veto power over the federal project," and, as said there:

> "Such a veto power easily could destroy the effectiveness of the federal act."

and:

> ". . . It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." (328 U. S. at 164)

3. THE DECISION OF THE SUPREME COURT OF WASHINGTON BELOW IS BELIEVED TO BE NOT IN ACCORD WITH FIVE GROUPS OF DECISIONS BY FEDERAL COURTS, INCLUDING THIS COURT, WHICH WERE NOT DISCUSSED OR ANALYZED BY THAT COURT IN ITS OPINION.

These federal cases establish five principles, which, viewed together as one mosaic, present a clear picture of the federal power asserted here but denied by the court below:

First, the Federal Government acting through its authorized agents has constitutional power under the commerce clause to construct a Federal dam on state-owned land without conforming to state law. See *Arizona* v. *California*, 283 U. S. 423, 451-52 (1931); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941). The Federal Power Act (16 U. S. C. A. § 791a, *et seq.*), to the extent that it has been construed by this Court, has been repeatedly upheld as within the plenary power of Congress over navigable waters, and state laws to the extent that they conflict with the Act or give the states a veto right over Federal projects thereunder, are deemed superseded. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940); *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 (1946); *Federal Power Com'n.* v. *Oregon*, 349 U. S. 435 (1955).

Second, the right of eminent domain is a sovereign power inherent in the Federal Government when acting pursuant to its Constitutional powers, and may be exercised without the consent of a state. See *Kohl* v. *United States*, 91 U. S. 367 (1876); *Chappell* v. *United States*, 160 U. S. 499, 510 (1896). The fact that the land is already devoted to a public use does not affect or impair this power. *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941); *United States* v.

Carmack, 329 U. S. 230 (1946); *United States* v. *Gettysburg Elec. R. Co.*, 160 U. S. 668, 685 (1896). In the *Oklahoma ex rel. Phillips* case, this Court upheld the power of the Federal Government, against a direct attack by the State of Oklahoma to condemn state-owned highways, bridges, schools, townships, and a prison farm, to be inundated by the proposed Denison Dam and Reservoir on the Red River authorized by Congress in the Flood Control Act of 1938.

Third, this Court has upheld the power of Congress to grant eminent domain powers to private corporations, endowed with no such powers under state law, in furtherance of interstate commerce. See *Luxton* v. *North River Bridge Co.*, 153 U. S. 525 (1894); *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 657-8 (1890). In this respect, the cases make no distinction between private corporations and municipal corporations as grantees. *Latinette* v. *City of St. Louis*, 201 Fed. 676 (7th Cir. 1912); *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (D. C. Ill., 1957); see *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9, 15 (C. C. N. J., 1887); *cf. Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 68-9, 80 (1898); *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, and *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, cited *supra*, pp. 17-18. In the *Latinette* case, which held that the City of St. Louis could condemn land in Illinois for a bridge over the Mississippi River pursuant to a Federal statute despite the City's lack of eminent domain powers under Illinois law, the court ruled that Congress could select the city as an agency through which a national power could be exercised. The court held:

> "... Nothing in the Constitution forbids the selection of a state corporation as a national agent.

> In reason the material thing is the principal's authority, not the parentage or birth place of the agent." (p. 679)

The same view was stated by Justice Bradley at circuit in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J., 1887) as follows:

> "In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable." (p. 15)

In a fairly recent case, not involving eminent domain, this Court, in a unanimous decision, held that under the Interstate Commerce Act the Commission could validly bestow superior federal powers upon a railroad corporation "over and above those bestowed upon it by the state of its creation".* *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118 (1948). The Court stated:

> ". . . These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. [citation] Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in that State." (pp. 126-7)

*The functions and powers of the Federal Power Commission are "comparable to those of the Interstate Commerce Commission in the field of transportation", *United States ex rel. Chapman* v. *Federal Power Com'n.*, 345 U. S. 153, 168 (1953).

Fourth, Section 21 of the Federal Power Act entitles duly authorized licensees under the Act, even though public agencies created by the State, to exercise a federal right of eminent domain against property situated within the state, without regard to whether such public agencies are endowed with similar eminent domain powers by state law. See the following cases in the lower federal courts: *Central Nebraska Public Power & Irrig. Dist.* v. *Harrison*, 127 F. 2d 588 (8th Cir. 1942); *Central Nebraska Public Power & Irrig. Dist.* v. *Fairchild*, 126 F. 2d 302 (8th Cir. 1942); *Samuelson* v. *Central Nebraska Public Power & Irrig. Dist.*, 125 F. 2d 838 (8th Cir. 1942); *Burnett* v. *Central Nebraska Public Power & Irrig. Dist.*, 125 F. 2d 836 (8th Cir. 1942); *Central Nebraska Public Power & Irrig. Dist.* v. *Berry*, 124 F. 2d 586 (8th Cir. 1942); *McGinley* v. *Central Nebraska Public Power & Irrig. Dist.*, 124 F. 2d 692 (8th Cir. 1942); *Feltz* v. *Central Nebraska Public Power & Irrig. Dist.*, 124 F. 2d 578 (8th Cir. 1942); *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. 2d 84 (4th Cir. 1940); *Harris* v. *Central Nebraska Public Power & Irrig. Dist.*, 29 F. Supp. 425 (D. C. Neb. 1938); *Grand River Dam Authority* v. *Going*, 29 F. Supp. 316 (D. C. Okla. 1939).

Fifth, Section 21 of the Federal Power Act grants licensees the right of eminent domain over state-owned property dedicated to a public use.

A case closely in point here is the oft-cited leading case of *Missouri* v. *Union Elect. Lt. & Power Co.*, 42 F. 2d 692 (D. C. Mo. 1930). This was an action by the State of Missouri (on behalf of one of its counties) against the Union Electric Light and Power Co., a private utility, which held a license from the Federal Power Commission under the Federal Power Act to

build a dam on the navigable Osage River, to enjoin its construction. The licensee had no capacity or power under Missouri law to condemn state land, dedicated to a public use. The court found that:

> "The evidence was undisputed that the dam, as proposed by the defendant Union Electric Light & Power Company, would have the effect to accumulate a vast body of water in a huge reservoir, and that the entire region within the valley of the Osage river and the valleys of its tributaries, for a distance of more than 100 miles, would be overflowed. This would result in submerging both public and private property, including the courthouse and jail in the village of Linn Creek, a large number of school districts, and at sundry points inundate the public highways . . ." (p. 694)

The court cited Section 21 of the Act, concluding that:

> "The licensee has been granted the power to acquire property by the exercise of eminent domain in express terms. . . .
>
> * * * * * * * *
>
> "In this connection it cannot be questioned but that the Congress had the power to confer the right of eminent domain upon the defendant Union Electric Light & Power Co." (p. 698)

With respect to the issue as to whether public property dedicated to a public use may be taken by the licensee, the court held:

> ". . . To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act." (p. 698)

Other federal decisions closely analogous that cannot be reconciled with that of the Supreme Court of Washington below are *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (D. C. Ill., 1957) and *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (C. C. N. J. 1887). The *City of Davenport* case held:

> "... If the State of Illinois or the City of Moline could supersede or prevent the exercise of this power of eminent domain it would be impossible to construct the authorized improvements. The inability of the States so to condition a right granted by Congress within its constitutional powers has often been made clear by both federal and state courts." (p. 797)

4. CLEARLY THE QUESTION IS OF IMPORTANCE NOT ONLY WITH RESPECT TO THE PARTICULAR PROJECT HERE INVOLVED BUT WITH REGARD TO THE RELATIVE POWERS OF THE STATES AND FEDERAL GOVERNMENT TO CONTROL THE CONSTRUCTION OF FEDERALLY AUTHORIZED PROJECTS ON NAVIGABLE STREAMS UNDER THE FEDERAL POWER ACT.

If the decision of the court below is permitted to stand, the states will have at their finger tips an easy method to veto practically any Federal project licensed to a public agency under the Federal Power Act. The ownership of lands under or adjacent to navigable streams by the various states is commonplace. *Cf. United States* v. *Utah*, 283 U. S. 64, 75 (1931). Control of a few acres in a reservoir area may be as effective a key to construction of a project as control of the damsite itself. Compare *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), with *Arizona* v. *California*, 283 U. S. 423 (1931). If no lands in the reservoir area are owned by the State, they could be easily purchased and dedicated to a "public use" of some kind.

Hence the states by the manipulation of their state lands, or their eminent domain laws, will have an easy way to avoid the result of this Court's decisions in *First Iowa Hydro-Electric Coop.* v. *Federal Power Com'n.*, 328 U. S. 152 (1946), and *Federal Power Com'n.* v. *State of Oregon*, 349 U. S. 435 (1955). *Cf. New Jersey* v. *Sargent*, 269 U. S. 328 (1926); *Iowa* v. *Federal Power Com'n.*, 178 F. 2d 421 (8th Cir. 1949), *cert. denied*, 339 U. S. 979 (1950).

". . . In such matters there can be no divided empire." *Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 80 (1898).

Inasmuch as the decision below and its rationale apply only to licensees which are public agencies of a state, then the way is open for one state official or agency which is opposed to the congressional policy of preference to public bodies expressed in Section 7 of the Federal Power Act (16 U. S. C. A. 800) to block all development by municipalities of that state in favor of private power companies.

The City of Tacoma is one of the oldest public power agencies in the United States, having been established in 1893. It is granted broad powers under state law to condemn lands for power projects, including state lands, *Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700 (1922), or lands held by a private power company dedicated to the public use for a power project, *Tacoma* v. *Nisqually*, 57 Wash. 620, 107 Pac. 199 (1910). If, notwithstanding Tacoma's broad powers thus adjudicated, the State can block Tacoma from proceeding with the present project under its federal license by administratively dedicating some small portion of State property in the reservoir area to some public use, then *a fortiori* the functioning of the Federal Power Act in any state can be thwarted.

CONCLUSION

For the reasons stated, it is believed that the decision of the court below poses fundamental issues regarding the proper sphere of federal and state powers with respect to projects for the development of the Nation's water-power resources authorized and licensed under the Federal Power Act, that the decision was wrong on the merits, and that this petition for a writ of certiorari to review that decision should be granted.

Respectfully,

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